Square D Electric Company *and* International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO. Case 9-CA-17649

May 11, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 17, 1982, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Square D Electric Company, Florence, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Failing and refusing to supply to the Union, International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, requested information which is relevant and necessary for the purpose of carrying out its representative function of processing grievances."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] We have substituted language in the Order and notice which generally orders Respondent to cease and desist from failing to supply requested information relevant and necessary for processing grievances.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail and refuse to supply to the Union, International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, requested information which is relevant and necessary for the purpose of carrying out its representative function of processing grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to and, upon request, furnish to the above-named Union the video tape-film, or afford it a reasonable opportunity to view and analyze the video tape-film, for the purpose of processing grievances.

SQUARE D ELECTRIC COMPANY

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon an unfair labor practice charge filed on November 9, 1981, by International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, herein called the Union or the Charging Party, against Square D Electric Company, herein called the Respondent, a complaint was issued by the Regional Director for Region 9 on behalf of the General Counsel on April 2, 1982.

The complaint alleges that, although the Union is the exclusive representative of the Respondent's employees, the Respondent has failed and refused to furnish it with the following information: video tape (film) in its possession which it contends shows the grieving employees engaged in misconduct for which they were discharged. The complaint further alleges that the requested information is necessary for the Union to properly and effectively process the grievance on behalf of the aggrieved employees.

The Respondent filed an answer to the complaint on April 8, 1982, in which it denied that it has engaged in any unfair labor practice alleged in the complaint.

A hearing in the above matter was held before me in Cincinnati, Ohio, on October 12, 1982. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Square D Electric Company, the Respondent herein, is, and has been at all times material herein, a Michigan corporation with an office and place of business in Flor-

ence, Kentucky, herein referred to as the Respondent's facility, where it is engaged in the distribution of electrical transmission equipment.

In the course and conduct of its bssiness operations during the past 12 months, a representative period, the Respondent purchased and received at its Florence, Kentucky, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Kentucky.

The complaint alleges, the Respondent admits, and I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that International Brotherhood of Electrical Workers, Local No. 2202, AFL–CIO, the Union herein, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Square D Electric Company, the Respondent herein, is engaged in the distribution of electrical transmission equipment. At all times material herein, International Brotherhood of Electrical Workers, Local No. 2202, AFL–CIO, the Union herein, has been the exclusive collective-bargaining representative of employees in the appropriate unit described as follows:

> All production and maintenance employees, including warehousemen, employed by the Respondent at Florence, Kentucky, excluding all office clerical employees, sales and technical employees, professional employees, guards and sspervisors as defined in the Act.

The collective-bargaining agreement in effect between the parties in 1981 contains a grievance procedure which provides for an arbitration procedure for processing grievances.

In the fall of 1981, employees *Art Kaiser* and *Robert Price* were suspended or discharged by the Respondent for allegedly stealing company property. Both Kaiser and Price filed grievances and individual meetings on their respective grievances were held on November 3, 1981. Present for the Company at the meetings were: Larry Whitler, personnel manager, Ken Dickson, and Linda Palmer, personnel supervisor. Present for the Union were: International representative Gordon Brey, Union President Kenneth R. Riley, Terry Buckler, and of course the grievants, Kaiser and Price.

The grievances, which denied the charge of stealing company property and requested all evidence and information upon which the Company based the suspensions of Kaiser and Price, were read at the beginning of each of the two meetings on November 3. The Respondent failed and refused to furnish certain evidence upon which it purportedly based the suspensions on the ground that it did not have to furnish such information or evidence. The Union contends that the information requested by it is necessary for, and relevant to, the effective performance of its representative function in processing grievances of employees in the appropriate unit. Consequently, the issues presented for determination in this proceeding are as follows:

> 1. Is the particular information of evidence (video tape-film) necessary for and relevant to the Union's performing its representative function in processing the grievances of Kaiser and Price.
>
> 2. Is Respondent's failure and refusal to furnish the particular information (video tape-film) requested by the Union violative of Section 8(a)(5) of the Act.[1]

B. *The Specific Evidence Requested by the Union for the Purpose of Processing the Grievances of Kaiser and Price*

During each of the grievance meetings of Kaiser and Price, respectively, Union President Riley and International representative Brey, on several occasions, requested the Respondent to furnish (allow them to see and examine) the video tape-film which the Respondent advised the Union shows Kaiser and Price stealing company property. Company Personnel Manager Whitler consistently advised the Union's grievance committee that, upon advice from the Company's attorney, the Company's evidence (a video tape-film and written statements of witnesses from inside and outside the Company) would not be submitted to the Union. However, the Company (Whitler) did tell the union committee the film was in color, with sound, and was of about 3 minutes duration. He gave them an oral description of what the video film shows as follows:

> Price and Kaiser taking 10 to 12 boxes of company stock and placing them in Price's car behind the seat. The box was about 2 square feet and Price and Kaiser had some difficulty getting the box into the car, and during their efforts to do so, the horn blew.

Both Kaiser and Price requested and received individual unemployment compensation hearings held in late December 1981 or early January 1982, respectively. Each claimant was represented by the Union and during each hearing the Respondent (Whitler) showed the video film (in color with sound) of the alleged theft in progress.

Union President Riley undisputedly testified that he was precluded by the referee from asking any questions, making any statements, or otherwise participating in either Price's or Kaiser's hearing unless he was a witness or an attorney for the claimants. However, he was allowed to observe the hearing, including the showing of the video film.

Riley further testified without dispute that the film showed Price driving out of the warehouse on a golf cart accompanied by Kaiser walking alone beside the

[1] The facts set forth above are not disputed and are not in conflict in the record.

cart. When they got to Price's car (an El Camino) on the employees' parking lot, Price took out a knife and cut the box in several places so it could fit behind the seat in his car. While forcing the box into the car, the box struck the steering wheel and the horn blew. Price closed the door and he and Kaiser went into the building. Riley said he could not see whether there were any other smaller boxes and he could not see or read any writing or printing which might have been on the box. During the showing of the film, there were no closeups or freeze frames shown and the Union did not have advance notice that the film was going to be shown.

Riley also testified that, during a meeting with Whitler subsequent to the unemployment hearing, the following conversation took place:

> He said one of the reasons, besides their advice from the attorney not to show the Union the film, another reason was that it was felt that regardless if we seen [sic] the film or not, or the evidence, that we would still arbitrate the cases.

Riley further testified as follows:

> After the Unemployment Hearing, during a meeting with myself and Larry Whitler, I indicated to Larry that I could not identify any markings on any boxes, as he first indicated that I would if I had seen the film.
>
> He, then, indicated that at one point of the film, if it was stopped and frozen at that point, then from a small box that he indicates that came out of the larger box that I would be able to identify that as Square D. markings and Square D. stock.

The Respondent did not present any witnesses or other evidence during the proceeding, but maintained its position that it was not legally required to furnish the Union with the specific information requested, more specifically, the video film.

Analysis and Conclusions

The Respondent does not dispute but in fact concedes the propriety of the law enunciated by the United States Supreme Court that an employer has a duty under the Act to supply, upon request, such information as may be potentially relevant and useful to a union's effective and intelligent evaluation and processing of employee grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967).

The Respondent nevertheless argues in its brief to me that its conduct in refusing to furnish the information (video tape-film) requested by the Union herein falls within the exception to the duty to furnish such information as that described in *Acme Industrial, supra*. In support of this position, the Respondent cites *Anheuser-Busch*, 237 NLRB 982, 984–985 (1978), where the Board held that the statutory obligation of an employer to furnish information requested by the Union is that set forth in *Acme Industrial*, but that statements by witnesses (recorded on parchment or tape) during an Employer's investigation of employee misconduct are fundamentally different from the types of information contemplated in *Acme Industrial, supra*. Such statements by witnesses, the Board held, may involve critical considerations, including the risk that "employer or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all," or such statements may have been given upon a pledge of confidentiality by the employer.

However, the uncontroverted evidence of record clearly demonstrates that the particular information (video film) requested by the Union herein did not constitute witness statements recorded on parchment or film. In fact, the film and photography thereon were not even established to have been the property or the work product of any employee. Instead, it may be reasonably inferred from the evidence that the film and photography were the property and work product of the Company. Under these circumstances, as counsel for the General Counsel argues, *Anheuser-Busch* is distinguishable from and not applicable to the undisputed facts in the instant proceeding.

The video tape-film requested by the Union herein is purported by the Respondent to have photographed Kaiser and Price in the act of stealing company property. The Company relied upon what it contends the film showed in discharging Kaiser and Price for the theft of company property. Since Price and Kaiser grieved the Company's theft charges, they are denying the charges, and the substance of the film has become an issue of proof of those charges. More specifically, the probative authenticity of what the Respondent contends the film evidences is of paramount concern to the Union; and meaningful access to the film by the Union is obviously necessary, essential, and certainly relevant to an intelligent evaluation of the validity of the charges by the Union, so as to enable the Union to decide whether to process the grievances to an arbitration hearing. *Detroit Edison Co. v. NLRB*, 440 U.S. 106, 301 (1979).

Also in the instant proceeding, the Union has not only unequivocally demonstrated that the requested information is probably relevant, as it only needs to show under *Acme Industrial, supra*, but it has shown that such film is in fact relevant since the Respondent advised the Union it relied upon the contents of the film in discharging the grievants. Consequently, I find that, by the Respondent's failure and refusal to supply the Union with the requested film or to allow the Union to view the film at reasonable times, places, and speeds with accommodating closeups and freeze frames, or whatever reasonable technical procedures may be utilized without damage to the film, in an effort to exact any information which the Union may deem probative and useful in effectively representing the grievants, the Respondent prevented the Union from effectively carrying out its function of representing employees in the bargaining unit. Such conduct by the Respondent violated Section 8(a)(5) of the Act.

Although the Court held in *Detroit Edison, supra*, that the employer may refuse to furnish relevant information requested by the union if the employer demonstrates a legitimate and substantial business interest or reason in refusing to do so, the Employer involved herein did not

provide evidence of any such business interest or reason for its refusal. Nor has the Employer herein made a good-faith effort to accommodate the Union's needs, so as to justify its refusal under *Detroit Edison*. Here, the Respondent merely gave the union its own oral description of what it said it observed during the showing of the film, and it did not object to the union representatives' chance viewing of the film in the unemployment compensation hearing.

However, neither the oral description by the Respondent nor the happenstance opportunity union officials got to view the film afforded the Union a reasonable opportunity to conduct an intense investigative viewing of the film as appeared necessary to identify alleged "Square D" or other markings on the boxes Kaiser and Price were transporting. Moreover, the fact that union represenatives were able to view the film during the unemployment compensation hearing does not exonerate the Respondent from its initial and unrevoked refusal to supply the Union with the requested film or a reasonable opportunity to view the film as heretofore described. *Bunker Hill Co.*, 208 NLRB 27, 35 (1973).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in close connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 protected rights, by failing and refusing to furnish the Union requested information pursuant to the grievance provision of its contract with the Employer, in violation of Section 8(a)(5) and (1) of the Act, the recommended Order will provide that the Respondent cease and desist from engaging in such conduct, and that, upon request, it shall supply the Union with the video tape-film or provide it with reasonable opportunity to make an intensive and an investigative analysis of said film as above discussed.

Upon the basis of the above findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Square D Electric Company, the Respondent herein, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, the Union herein, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to furnish the Union, the exclusive representative of employees in the bargaining unit, the information requested, including video tape-film, or reasonable access to the information requested, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The Respondent, Square D Electric Company, Florence, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to supply or affording the Union, International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, reasonable opportunity for intense analysis of the requested video tape-film for the purpose of processing the grievances of the grievants.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to and, upon request, furnish the Union, International Brotherhood of Electrical Workers, Local No. 2202, AFL-CIO, the information, including video tape-film, requested, or afford it a reasonable opportunity to view and analyze said film, for the purpose of effectively discharging its representative function in processing or not processing grievances.

(b) Post at the Respondent's Florence, Kentucky, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."